PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-2001

EQUITY INVESTMENT ASSOCIATES, LLC,

Petitioner – Appellant,

v.

UNITED STATES OF AMERICA,

Respondent – Appellee.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Graham C. Mullen, Senior District Judge. (3:21-cv-00170-GCM)

Argued: March 9, 2022 Decided: July 8, 2022

Before RICHARDSON, and HEYTENS, Circuit Judges, and KEENAN, Senior Circuit Judge.

Affirmed by published opinion. Judge Richardson wrote the opinion, in which Judge Heytens and Senior Judge Keenan joined.

ARGUED: Jeffrey S. Luechtefeld, CHAMBERLAIN, HRDLICKA, WHITE, WILLIAMS & AUGHTRY, PC, Atlanta, Georgia, for Appellant. Kathleen E. Lyon, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** Hale E. Sheppard, John W. Hackney, CHAMBERLAIN, HRDLICKA, WHITE, WILLIAMS & AUGHTRY, PC, Atlanta, Georgia, for Appellant. David A. Hubbert, Deputy Assistant Attorney General, Jennifer M. Rubin, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Dena J. King, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charlotte, North Carolina, for Appellee.

RICHARDSON, Circuit Judge:

The Internal Revenue Service is barred from issuing a summons "with respect to any person if a Justice Department [criminal] referral is in effect with respect to such person." I.R.C. § 7602(d)(1). The IRS issued a summons for information to Equity Investment Associates, LLC. Equity sought to quash that summons, arguing that an existing criminal referral for its lone agent, Jack Fisher, must be treated as a referral for Equity itself.[1] We reject this argument because we hold that, under § 7602, a business entity is a distinct person from its agents. And because we only look to whether the taxpayer itself has been referred to the Justice Department, Equity cannot quash the summons.

I. Background

Conservation easements protect environmentally and historically important land. Gifting such easements allows the property owner to claim a charitable tax deduction for the value of the relinquished property rights. Unfortunately, conservation easements have also been used by tax-fraud schemers.

[1] The IRS has broad powers to investigate criminal tax fraud, but it lacks the power to prosecute tax fraud. So if an IRS criminal investigation discovers evidence of criminal activity, the IRS must refer the case to the Justice Department for prosecution. Once referred, the IRS typically plays a continued role in investigating and prosecuting the case.

The syndicated conservation easement can be one such fraud scheme, where promoters purchase land through a partnership[2]—which has pass-through tax treatment—and sell ownership interests in the partnership. The partnership then grants conservation easements on the land to a qualified charitable or government organization. The fraud arises when the promoters obtain appraisals for the conservation easement well above the land's purchase price.[3] Then the partnership uses the conservation easement's inflated value to claim an exaggerated tax deduction for gifting the easement. It then passes that deduction through to its owners, who use it to avoid more in tax liabilities than they paid for their partnership interest.[4]

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[2] As we see here, LLCs are often treated as general partnerships under the Tax Code. I.R.S. Pub. 3402 (Mar. 2020). And that includes Equity, which is a multi-member LLC. So while we use the term partnership, we do so in the tax-code sense.

[3] This inflation is possible because the easement's value is often not calculated based on the land's recent purchase price but based on the value of its highest and best use. *See PBBM-Rose Hill, Ltd. v. Comm'r*, 900 F.3d 193, 209 (5th Cir. 2018). So the limit on the valuation is little more than the imagination of the appraiser (who may be in on the scheme), tempered only by the fear of an audit. *See generally* Mary Clark, *Greedy Giving, Bad for Business: Examining Problems with Arbitrary Standards in Appraising Conservation Easements*, 51 U. Mem. L. Rev. 479 (2021).

[4] The other aspect of the fraudulent scheme is the "syndication." The charitable-donation tax deduction is non-transferrable. So, to provide the deductions to wealthy people who can use them, fraudsters sell them shares in a partnership, which makes the easement donation and passes the corresponding deduction through to its members. While a partnership may pass through tax benefits, a partnership with no "economic substance" that serves only to disburse tax benefits is a sham. *See Superior Trading, LLC v. C.I.R.*, 728 F.3d 676, 680 (7th Cir. 2013) ("If the only aim and effect are to beat taxes, the partnership is disregarded for tax purposes."); *see also* I.R.C. § 7701(o); *Black & Decker Corp. v. United States*, 436 F.3d 431, 440–41 (4th Cir. 2006) (describing the economic substance rule). Given the prevalence of sham partnerships and fraudulent appraisals, the IRS demands that many syndicated conservation easements must be reported to the IRS. *See* IRS Notice 2017-10, 2017-4 I.R.B. 522, 544; I.R.C. §§ 6662A, 6707A.

One syndicated conservation easement was operated by Equity Investment Associates. Equity owned almost 2,000 acres in Brunswick County, North Carolina and donated a conservation easement on 1,297 acres to the North American Land Trust. In its 2018 tax return, Equity submitted an appraisal claiming that the full 1,920 acres, if developed as a luxury subdivision, had a value of $270 million, but a value of only $47 million after the conservation easement. Based on the appraisal, Equity claimed a $223 million deduction for the conservation easement. The IRS was suspicious and began investigating.

The sole person with the authority to act on Equity's behalf for federal tax purposes is Jack Fisher. *See* 26 C.F.R. §§301.6223-1(b)(3)(i), 301.6223-2(d)(2)(ii). Equity's majority owner is Southeast Property Acquisitions, which owns 80 percent and serves as Equity's manager. In turn, Southeast Property is controlled by its managing member, Inland Capital Management, which Fisher manages. The IRS's investigation into Equity's 2018 conservation easement deduction also embroiled Fisher and the other companies that owned and managed Equity.

In 2019, the IRS executed a search warrant at Inland's offices, which Equity shared with Inland. The warrant alleged various tax-fraud violations and authorized seizure of "evidence, fruits, and instrumentalities" of the alleged fraud, including the documents and information of Equity, Southeast Property, Inland, and other entities created or controlled by Fisher. Around the same time, a grand jury issued a subpoena to Inland seeking records related to transactions with Jack Fisher, Inland, Southeast Property, and Equity. The

subpoena specifically requested documents relating to IRS audits and to preparing and filing tax returns related to Fisher, Inland, Southeast Property, and Equity.

The accountants that prepared Equity's tax return, Stein Agee and Corey Agee, pleaded guilty to conspiring to defraud the United States for selling, along with co-conspirators, "investments" in fraudulent syndicated conservation-easement tax shelters. Dep't of Justice, Press Release 20-1381, *Atlanta Tax Professionals Plead Guilty to Promoting Syndicated Conservation Easement Tax Scheme Involving More Than $1.2 Billion in Fraudulent Charitable Deductions* (Dec. 21, 2020). The Justice Department labeled the partnerships involved "a sham, lacking economic substance and serving no legitimate business purpose" and noted that the Agees' "convictions signal just the beginning of the department's prosecutive efforts." *Id.*

While those criminal investigations were ongoing, the IRS continued its civil investigation of Equity. The IRS sent Equity multiple Information Document Requests in 2020 and 2021 requesting Equity's bank statements, among other information. After Equity failed to respond to the first request, the IRS made another request, and Equity produced its 2018 general ledger and Southeast Property's bank statements. Although the general ledger reflected a bank account in Equity's name at BB&T Bank (now Truist Bank), Equity did not produce those bank statements. The IRS followed up seeking Equity's bank accounts, but Equity again only produced Southeast Property's bank statements.

The IRS then sent a civil administrative summons to Truist for Equity's account information, providing notice of the summons to Equity and its counsel. In response,

Equity petitioned the district court to quash the summons and requested an evidentiary hearing and limited discovery. Equity argued that the summons should be quashed under § 7602(d) because a Justice Department criminal referral was already in effect for Equity or one of its agents (Fisher).

The government opposed Equity's petition to quash, seeking instead to enforce the summons. In support, the government submitted a declaration from IRS Revenue Agent Richard Skinner who explained the purpose of the summons, how the information sought was relevant to the IRS's investigation of Equity, that the IRS did not already possess the relevant information, and that the IRS followed other administrative steps required by the Internal Revenue Code, including notice to Equity. The government also provided a declaration by IRS Supervisory Special Agent Mary Blackerby who attested that a Justice Department criminal referral was not in effect for Equity. Agent Blackerby stated that she had "access to the internal case files for investigations assigned to special agents in the work group [she] supervise[d]" and that she "reviewed the internal case files and searched for the petitioner in this case." J.A. 58. Agent Blackerby's review revealed no Justice Department referral in effect for Equity for tax year 2018.

The district court denied Equity's petition to quash the summons, rejected the request for an evidentiary hearing and limited discovery, and granted the government's motion to enforce the summons.

After the district court ruled, a grand jury indicted Fisher for crimes related to the fraudulent syndicated conservation easements. Counts 46 and 51 alleged that Fisher was responsible for Equity's fraudulently claimed $223 million deduction.[5]

II. Discussion

To enforce a summons (or overcome a motion to quash), the government must first show that (1) "the investigation will be conducted pursuant to a legitimate purpose," (2) the inquiry may be relevant to that purpose," (3) "the information sought is not already within the Commissioner's possession," and (4) "the administrative steps required by the Code have been followed." *United States v. Powell*, 379 U.S. 48, 57–58 (1964); *Alphin v. United States*, 809 F.2d 236, 238 (4th Cir. 1987). The government must also overcome the added constraint imposed by § 7602(d)(1) that "[n]o summons may be issued . . . with respect to any person if a Justice Department referral is in effect with respect to such person."[6] The government's burden is "fairly slight" and an affidavit of an agent involved

[5] Although these facts occurred after the district court's review of this case, we take judicial notice of them under Federal Rule of Evidence 201. *See United States v. Townsend*, 886 F.3d 441, 444 (4th Cir. 2018).

[6] The district court analyzed Equity's argument under § 7602(d)(1) as a challenge to the fourth *Powell* factor that the government did not follow "the administrative steps required by the code." J.A. 266–67. But the Supreme Court has made clear that § 7602(d) is "an additional constraint on the issuance of summons" beyond the four *Powell* factors. *United States v. Stuart*, 489 U.S. 353, 361 (1989) (discussing I.R.C. § 7602(c) (1994), which was redesignated as I.R.C. § 7602(d) by the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3417, 112 Stat. 685, 757); *see High Desert Relief, Inc. v. United States*, 917 F.3d 1170, 1182 n.5 (10th Cir. 2019) (holding that § 7602(d) is an "analytically distinct issue"). Even so, the evidentiary burdens and framework are the same no matter if the challenge is to the *Powell* factors or under § 7602(d). *See Stuart*, 489 U.S. at 360–61 (holding that the government's burden under § 7602(d) was satisfied by an IRS agent's affidavit).

in the investigation is enough to meet it. *Alphin*, 809 F.2d at 238; *accord Stuart*, 489 U.S. at 362.

If the government meets that slight burden, then the "heavy burden of disproving the actual existence of a valid civil tax determination or collection purpose" shifts to the taxpayer. *Alphin*, 809 F.2d at 238. Even obtaining an evidentiary hearing requires evidence "plausibly raising an inference" that the government has acted in bad faith or that a Justice Department referral is in effect. *United States v. Clarke*, 573 U.S. 248, 254 (2014); *see* § 7602(d)(1) ("No summons may be issued . . . with respect to any person if a Justice Department referral is in effect with respect to such person.").

Equity asserts two alternative arguments about why it is the subject of a Justice Department criminal referral. First, it argues that the § 7602(d) referral bar applies not only when the partnership has been referred, but also when an agent of the partnership has been. Second, it argues that the record suggests that there is, indeed, a referral as to Equity itself. We take those in turn.

A. "Person" in § 7602(d) does not include a legal person's agents

Equity argues that the "person" identified in § 7602 includes both Equity and its agents.[7] Equity suggests we adopt the definition of "person" in an unrelated section of the tax code, § 7343: "The term 'person' as used in this chapter includes an officer or

[7] We agree with both parties that Equity is the "person" that a Justice Department referral would have to be "in effect with respect to" in order to bar the summons. *See* § 7602; *Khan v. United States*, 548 F.3d 549, 557 (7th Cir. 2008) (holding that a summons may be enforced against a third party when the third party is the subject of a Justice Department investigation because "§ 7602(d)(1) applies only when the IRS has referred the taxpayer whose liabilities are at issue").

employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs." Equity takes this to mean that the person "Equity" includes Equity's agents—so if any agent is the subject of a referral, then the summons against Equity is barred by § 7602. If Equity were right about this more expansive definition of "person," then the IRS likely failed to meet its initial burden to show there is no open Justice Department referral. Blackerby attested that there were no open referrals under the name "Equity Investments, LLC," but made no representations about whether there are open referrals for any agent, including Jack Fischer.

Equity's argument ignores the clear text of § 7343. That provision, the source of Equity's broad definition of "person," explicitly states that it does not apply to § 7602 because the definition in § 7343 only applies to "'person' as used in this chapter," which is Title 26, Chapter 75 of the Code. And § 7602 is *not* in Chapter 75 but Chapter 78. Instead of § 7343, the definition of person applicable to § 7602 is in § 7701(a)(1).

Section 7701(a)(1) states that "[w]hen used in [Title 26], where not otherwise distinctly expressed or manifestly incompatible with the intent thereof . . . [t]he term 'person' shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation." § 7701(a)(1). That definition does not consider members, officers, or employees of a business entity to be a part of the same "person" as the business entity itself. By omitting officers, members, and employees from the personhood of business entities in § 7701(a)(1) but including those same people in the

definition it adopted for § 7343, Congress made an express decision that "person" for purposes of § 7602 only means the business entity itself.

Equity also argues that even if the definition of person in § 7701(a)(1) applies, the statute is non-exclusive in the list of entities that count as a person, so it should be read to include business agents as part of the same person. The words "includes" and "including" when used in Title 26 "shall not be deemed to exclude other things otherwise within the meaning of the term defined." § 7701(c). Equity argues that the statute's specific reference to only the business entities themselves is thus not exclusive because agents of a business entity are "otherwise within the meaning" of the term "person."

But "person" is not naturally read to suggest both a business entity and its officers, members, and employees. The law may consider a business entity to be a person. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 342–43 (2010); *Artificial Person*, *Black's Law Dictionary* (9th ed. 2009). But the law usually does not consider a business entity to be the *same* person as each officer, member, or employee. An LLC, like a corporation, is "a separate 'legal person,' [which] can exercise rights and powers in its own name." Richard D. Freer & Douglas K. Moll, *Principles of Business Organizations* 615 (2d ed. 2018). Furthermore, the law in North Carolina—where Equity is organized—makes clear that LLCs are distinct persons from both their members and managers. *See* N.C. Gen. Stat. § 57D-2-01(a) ("An LLC is an entity distinct from its interest owners."); § 57D-3-30 ("A person who is an interest owner, manager, or other company official is not liable for the obligations of the LLC solely by reason of being an interest owner, manager, or other company official.").

Indeed, § 7602's text shows that the statute considers business entities as distinct persons from their agents. Under § 7602(a)(2) "the Secretary is authorized . . . [t]o summon the person liable for tax or required to perform the act, or any officer or employee of such person." If "person" already included the officers and employees of a business entity, there would have been no reason for Congress to have provided for "any officer or employee of such person" in § 7602(a)(2), and Equity's preferred definition as applied to § 7602(a)(2) would create surplusage.

Thus, absent statutory direction—like that provided in § 7343—we refuse to treat a business entity as a part of the same "person" as its members, officers, and employees. Because "person" means the business entity itself as relevant here, Equity must show that a Justice Department referral is in effect for the LLC itself, not its agents.

B. There is no evidence of a referral for Equity

As a fallback argument, Equity claims to have put forward enough evidence to require an evidentiary hearing. Obtaining an evidentiary hearing requires Equity to point to evidence "plausibly raising an inference" that a criminal referral was in effect for Equity. *See Clarke*, 573 U.S. at 254.[8] "Naked allegations" and "conclusory allegations" are not

[8] The government met its initial burden of showing that there is no open referral for Equity. Equity argues that Agent Blackerby's declaration fails to establish a prima facie case because she failed to affirmatively state that the agents she supervised, and whose files she searched for a Justice Department referral, were the agents who would have been responsible for Equity's case. It is true that the declaration could be more precise. But given the government's slight burden and the broad discretion we give to the district court, we find no error here. Any imperfection in the affidavit is best factored into whether Equity has done enough to raise a plausible inference that a Justice Department referral is in effect. Nor was Agent Blackerby required to provide details on how the government received its (Continued)

enough as the taxpayer must put forward "some credible evidence" through "specific facts or circumstances." *Id.* at 254–55. And we review the district court's decision to deny an evidentiary hearing for abuse of discretion, giving "appropriate deference" to the district court's "superior familiarity with, and understanding of, the dispute." *Id.* at 255–56.[9]

Equity must show evidence that a referral existed before the IRS summons, because the IRS can generally use its summons power to further a criminal investigation. § 7602(b). The summons power only ends "at the point where an investigation was referred to the Justice Department for prosecution." *United States v. Morgan*, 761 F.2d 1009, 1012 (4th Cir. 1985). And a Justice Department referral is not simply some generalized suspicion of criminal activity, but a specific procedural mechanism used to share information. *Id.* (describing a Justice Department referral as a "mechanical test").

A Justice Department referral occurs only when (1) the IRS recommends a person to the Attorney General for prosecution or (2) the Justice Department requests a taxpayer's information from the IRS.[10] § 7602(d)(2)(A). A Justice Department request counts as a

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information. Indeed, she remains bound by the confidentiality rules applicable to grand jury proceedings under Federal Rule of Criminal Procedure 6(e) and the confidentiality requirements of I.R.C. § 6103.

[9] "A district court abuses its discretion only where it has acted arbitrarily or irrationally, has failed to consider judicially recognized factors constraining its exercise of discretion, or when it has relied on erroneous factual or legal premises." *L.J. v. Wilbon*, 633 F.3d 297, 304 (4th Cir. 2011) (cleaned up).

[10] "A Justice Department referral is in effect with respect to any person if—(i) "the Secretary has recommended to the Attorney General a grand jury investigation of, or the criminal prosecution of, such person for any offense connected with the administration or enforcement of the internal revenue laws, or (ii) any request is made under section (Continued)

referral even if the taxpayer isn't the focus of the Department's investigation. § 6103(h)(2)(B) (noting that the Justice Department may request taxpayer information that "may be related to the resolution of an issue in the proceeding or investigation" of a third party). But if the Justice Department obtains taxpayer information without receiving that information from the IRS or requesting that information from the IRS—such as through a search warrant or a grand jury subpoena—there is no referral in effect for that taxpayer. *See Baskin v. United States*, 135 F.3d 338, 342 (5th Cir. 1998) (quoting § 6103(b)(2)). So the key question isn't whether the Justice Department is investigating the taxpayer, or even whether it has their tax records. Rather, it is whether the Department got those tax records *from the IRS*, or has otherwise been asked to investigate the taxpayer *by the IRS*.

The record before us does not suggest that either type of referral occurred here, and we certainly cannot say that the district court abused its discretion. Equity provided no direct evidence that a Justice Department referral was in effect for it, and Equity's circumstantial evidence largely relies on "conjecture." *See Clarke*, 573 U.S. at 254. Equity suggests that the fact that the Justice Department has its tax records reveals that it must have requested and received them from the IRS. But the Justice Department can obtain tax information without obtaining that information from the IRS. In fact, the grand jury investigations and search warrants relating to the Agees, Inland, and Fisher provide a likely

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6103(h)(3)(B) for the disclosure of any return or return information (within the meaning of section 6103(b)) relating to such person." § 7602(d)(2). As defined, "return" and "return information" basically include any tax information filed with the IRS and any information about a taxpayer that was furnished to the IRS and could be linked to that particular taxpayer. § 6103(b)(1)–(2).

explanation for how the Justice Department came to possess some information about Equity's financial dealings and tax returns without making a request under § 6103(h)(3)(B). *See Baskin*, 135 F.3d at 342. The grand jury subpoena to Inland specifically required the production of "[a]ll documents related to the preparation and filing of all tax returns related to" Equity, J.A. 180–83, and it is therefore unsurprising that prosecutors obtained that information without needing to initiate a Justice Department referral.

Equity's other evidence only suggests that the government believed that Equity had committed a crime. However, suspicion and even criminal investigation does not prevent the IRS from issuing a summons. The IRS can continue to avail itself of the summons power until it crosses the "bright line" of making a Justice Department referral. *See Morgan*, 761 F.2d at 1012. It is evidence of "specific facts or circumstances" suggesting a Justice Department referral, not generalized suspicion, that Equity must rely on to meet its burden. *See Clarke*, 573 U.S. at 249.

Accordingly, the district court did not abuse its discretion when denying Equity's motion for an evidentiary hearing. And because Equity cannot meet that lower burden, it cannot meet the "heavy burden of disproving the actual existence of a valid civil tax determination or collection purpose." *See Alphin*, 809 F.2d at 238. The district court's judgment is therefore

AFFIRMED.